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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, *et al.*,

Appellants,

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF THE DISABLED AMERICAN VETERANS IN SUPPORT OF THE UNITED STATES

JOSEPH C. ZENGERLE*
WILLIAM N. BERKOWITZ

BINGHAM, DANA & GOULD
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 822-9320

Counsel for
The Disabled American Veterans

*Counsel of Record

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF *AMICUS CURIAE*[1]

The Disabled American Veterans ("DAV") is one of the nation's largest nonprofit veterans' organizations, chartered

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[1] Pursuant to Supreme Court Rule 36, written consent to the filing of this brief has been obtained from counsel for all parties and the letters of consent have been filed with the Clerk of the Court.

in 1932 by an Act of Congress, 36 U.S.C. §§ 90a *et seq.*, and exempted from federal income taxation under the Internal Revenue Code. 26 U.S.C. §§ 501(a) and 501(c)(4). Membership in DAV is restricted essentially to those persons disabled in time of war while serving in the armed forces of the United States and subsequently discharged under honorable conditions. 36 U.S.C. § 90e. DAV has more than 900,000 members, of whom nearly 300,000 are disabled Vietnam veterans.

DAV's principal activities are the conduct of various programs designed to assist member and nonmember veterans alike in obtaining the fair compensation, adequate medical care and suitable employment to which their disabling wartime military service entitles them. As reflected in DAV's most recent audit report submitted to the Comptroller General of the United States for the year ended December 31, 1983, *see* 36 U.S.C. § 90i(b), the annual budget for the operation of these programs is in excess of $25 million.[2] Approximately $18 million, or 70% of that program budget, is used to maintain the largest service program of all the nation's veterans' organizations.

DAV's service program is conducted by a paid professional staff of more than 250 full-time employees called National Service Officers ("NSOs"). During 16 months of initial training conducted by DAV, each NSO must secure accreditation from the Veterans' Administration ("VA") as a representative of DAV, a recognized service organization. 38 U.S.C. § 3402(a); 38 C.F.R. § 14.629(a). This accreditation authorizes the NSO to assist veterans in making claims under laws administered by the VA. DAV has NSOs assigned to every VA Regional Office in the United States and Puerto Rico, certain VA Medical Centers, the Pentagon and elsewhere, totaling approxi-

[2] Approximately 80% of DAV's annual financial support derives from public donations; the balance is roughly divided among investment income and membership dues. More than 60% of DAV's total revenue is devoted to the operation of these programs.

mately 70 office locations. In addition, NSOs regularly provide services to veterans living in more remote areas of the country through the operation of DAV's Mobile Field Service Unit Program. As an indication of the scope of NSO representation, in the year ended June 30, 1983, NSOs obtained more than 100,000 powers of attorney from veterans seeking some form of claims assistance. *Sixty-Third National Report, Disabled American Veterans, 1983*, H.R. Doc. No. 98-150, 98th Cong., 2d Sess. 102 (1984).

DAV has developed its extensive national service program as a primary means of fulfilling its statutory purposes to advance the interests of disabled veterans and cooperate with the VA. 36 U.S.C. § 90c. This development has been possible because the claims representation services of NSOs have been provided to all veterans free of charge, thereby complying with the $10 fee limitation imposed by the statutory provisions challenged in this case. 38 U.S.C. §§ 3404-05. An examination of the nature of DAV's service program and the VA claims representation services provided to veterans from other sources will necessarily play an important role in this Court's analysis of the constitutional issues presented herein. Because the outcome of this case will therefore unavoidably raise an inference about the adequacy of DAV's most significant nonprofit activity on behalf of disabled veterans, DAV seeks this opportunity to present its views to this Court as *amicus curiae*.[3]

[3] At the Government's request and without the benefit of its own counsel, DAV provided information of record in the District Court proceedings. Mr. Charles E. Joeckel, Jr., DAV's National Director of Services, executed a declaration ("Joeckel Decl.") attached to the closing brief filed on November 21, 1983, in support of the Government's opposition to appellees' motion for a preliminary injunction.

SUMMARY OF ARGUMENT

The District Court demonstrated an insufficient regard for a coordinate branch of government when it preliminarily enjoined the operation of the statutory provisions at issue. In light of the facts that Congress has repeatedly rejected modification of the statutory scheme that includes those provisions after having thoroughly considered the same veterans' interests at conflict in this case, and that it now has before it again similar proposals for reform, this Court should hesitate to displace legislative competence with constitutional adjudication, especially with regard to subject matter historically treated with judicial deference. When examined with principles of restraint in mind, it is evident that the judgment under review proceeds from an application of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), that strikes an analytically and factually deficient balance of due process considerations and concludes with an unjustified extension of First Amendment doctrine.

The private interests of veterans in the property at stake include a psychological value fostered by the free claims assistance rendered by disabled service officers that calls for maintenance of the challenged $10 fee limitation. The unusual qualifications possessed by these service officers particularly enable them to function in the nonadversarial proceedings of the VA with an effectiveness that yields a more than acceptable risk of erroneous claim determination — a risk that an influx of paid attorneys, with its predictably formalizing effect on agency behavior, could well increase rather than diminish. The Government's substantial non-financial interests in guarding against unnecessary legal expenses and preserving an informal benefit system supported administratively and legislatively by strong veterans' service organizations demonstrate finally the validity of the status quo as a matter of due process of law. The existing statutory and regulatory scheme also adequately safeguards the First Amendment rights of petition and free

speech of appellees, whose associational rights have not been abridged by the fee limitation because of their economic motive.

ARGUMENT

I. Principles of Judicial Restraint, Improperly Ignored by the District Court, Apply to This Controversy Because of the Court's Historical Solicitude in this Area and Congress' Plenary Consideration of VA Benefit System Procedures and Repeated Recent Determinations to Leave Them Unchanged.

This Court has traditionally given Congress a wide constitutional berth in enacting statutes for the benefit of those who have served in the armed forces of the United States. *See, e.g., Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540 (1983) (upholding tax exemption of veterans' organizations against equal protection and First Amendment challenges); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979) (upholding Massachusetts veterans' preference law against equal protection challenge); and *Johnson* v. *Robison*, 415 U.S. 361 (1974) (upholding "G.I. Bill" for veterans against equal protection and First Amendment challenges). This historical solicitude has in part been based upon the "moral obligation and debt of gratitude," *Mitchell* v. *Cohen*, 333 U.S. 411, 420 (1948), that the country owes to veterans for their subjection to "*the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life.*" *Johnson, supra*, 415 U.S. at 380 (emphasis in original).

In such cases, the parties seeking relief have not, as a general rule, shared the interests of the veterans for whose benefit the

statutes challenged by these parties were enacted. *See, e.g., Regan, supra* (challengers were charitable organizations not including veterans' groups); *Feeney, supra* (challenger was nonveteran woman); and *Johnson, supra* (challenger was conscientious objector). Accordingly, the special obligation owed to veterans could be invoked without compromise to shield the statutes under attack and thus preserve Congress' attempt to discharge the nation's obligations to the veteran-beneficiaries of the enactments.

In this case, however, the original parties seeking relief — appellees herein — are two veterans' organizations and four individual veterans. Since the nation's special obligation runs in part to the challengers of the statutory provisions at issue here, 38 U.S.C. §§ 3404-3405, the degree to which that obligation operates to shield those provisions is unclear. This uncertainty is enhanced by DAV's own alignment as *amicus curiae*. On the one hand, DAV would generally support the District Court's view as to the importance of veterans' benefits made available under Title 38 of the U.S. Code. *National Ass'n of Radiation Survivors* v. *Walters*, 589 F.Supp. 1302, 1314-1315 (N.D. Cal. 1984) ("*NARS*"). *See infra* p. 13. Indeed, as a matter of policy, DAV has no objection to modification of the fee limitation provisions attacked by appellees, to the extent that the current prohibition under 38 U.S.C. § 211(a) of judicial review of decisions by the VA Administrator is also modified.[4]

[4] *See Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 22 and 154 (1983) ("House Hearings") (statement of John F. Heilman, DAV National Legislative Director); *Veterans' Administration Adjudication and Judicial Review Act, etc.: Hearing Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 237 (1983) ("Senate Hearing") (statement of Mr. Heilman). DAV would have no objection to the payment of reasonable fees by veteran claimants for attorney representation in judicial review proceedings, as distinguished from proceedings conducted under laws administered by the VA. House Hearings, *supra*, at 34; Senate Hearing, *supra*, at 250.

On the other hand, DAV vigorously supports the United States and opposes appellees in defending the constitutionality of the $10 fee limitation under the current statutory scheme. Although this fundamental conflict between the positions of DAV and appellees shifts some component of the special obligation running to veterans away from appellees and back to the defenders of the statutes, that traditional basis for deference to Congressional action remains of uncertain strength. DAV submits, however, that the conflict of veterans' interests herein provides an independent basis for this Court to exercise self-restraint in considering the constitutionality of the $10 fee limitation.

The independent basis for the Court to stay its constitutional hand arises from the fact that essentially the same multiplicity of veterans' interests at work in this case has recently and consistently been resolved by the Congress in favor of preserving unchanged the statutes challenged here. For the last three consecutive Congresses, the statutory scheme containing the $10 fee limitation has been the subject of intense Congressional scrutiny without ultimate legislative action.[5] DAV has provided extensive testimony on the legislative proposals considered by the Congress in this regard, *see, e.g., supra* note 4, while other veterans' organizations that support appellees in this litigation have also presented views to the Congress on these same legislative proposals to modify the fee limit.[6] The refusal of Congress to enact legislation disrupting the statutory scheme

[5] In each of the 96th, 97th and 98th Congresses, the Senate passed a bill modifying, *inter alia*, both the judicial review and fee limitation provisions of Title 38. The House, however, refused to adopt companion measures, thus preventing agreement with the Senate that might have permitted alteration of the statutory scheme. *See* S. 636, 98th Cong., 1st Sess. (1983); S. 349, 97th Cong., 2d Sess. (1982); S. 330, 96th Cong., 1st Sess. (1979).

[6] *See, e.g.*, House Hearings, *supra* note 4, at 73-76 (statement of John F. Terzano, Legislative Director, Vietnam Veterans of America ("VVA")). VVA is expected to file herein a brief *amicus curiae* in support of appellees.

after plenary consideration of these proposals reflects the judgment of Congress that the competing interests among veterans with respect to statutory reform are properly balanced by the maintenance of the status quo.[7]

As this Court observed in upholding another statutory and regulatory scheme (the Fairness Doctrine) against constitutional attack: "Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned." *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973) ("*CBS*"). DAV submits that Congress is constitutionally better equipped not only to make comprehensive inquiry into the procedural operation of the VA benefit system, but also to assess the weight that should be accorded the views of those, like DAV, of whom it makes such inquiry so as to balance "the interests of all."[8] This is especially so when the environ-

[7] Appellees reject this implication because "the $10.00 fee limitation has never been separately considered by Congress." Appellees' Motion to Affirm ("Mot. to Aff."), at 30. But the fairness of a complicated and interrelated statutory and regulatory scheme for mass claims administration cannot sensibly be judged piece by piece, but rather must be examined as a whole. The principle emerges in the Court's own due process examinations:

> [I]t is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision of the challenged statutory scheme. Such a focus threatens to overlook factors which may introduce constitutionally adequate protections into a particular government action. *Santosky* v. *Kramer*, 455 U.S. 745, 775 (1982) (Rehnquist, J., dissenting).

[8] For example, the status of a service organization recognized by the VA carries with it implications of organizational standing and experience with the VA claims administration process that are familiar to Congress and are undoubtedly taken into account by it when considering the effect of testimonial information. In this regard, DAV was included by name in the statute authorizing such recognition when it was enacted. 38 U.S.C. § 3402. With respect to the two original organizational plaintiffs in this case, however, appellee National Association of Radiation Survivors is not recognized by the VA. Appellee

ment in which the scheme operates is "dynamic." *Id.* That characteristic is applicable to the modern VA benefit system, which has witnessed the development of DAV's (and other organizations') service programs contemporaneously with the increasingly complicated nature of benefit claims "arising from such causes as exposure to atomic radiation or Agent Orange, or from Post Traumatic Stress Syndrome." *NARS, supra,* 589 F.Supp. at 1320.

A final consideration bearing upon the degree to which the respect due a coordinate branch of government is implicated in this case was also noted in *CBS, supra*. There, the Court commented that the agency administering the constitutionally challenged regime was conducting a "wide-ranging study" of the scheme that had gotten underway during the pendency of the case, stating: "At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding." 412 U.S. at 132. Similarly here, the Legislative Branch has during the last three Congresses considered (and rejected) proposals to modify the fee limitation and other related provisions of Title 38. *See supra* note 5. In addition, in the 99th Congress, bills have already been introduced which, if enacted, would modify the $10 fee limit. H.R. 585, 99th Cong., 1st Sess. § 401 (1985) (introduced by more than eighty-five (85) original sponsors, *see* 131 Cong. Rec. H129-130 (daily ed. Jan. 22, 1985)); H.R. 313, 99th Cong., 1st Sess. § 401 (1985), *see* 131 Cong. Rec. H102 (daily ed. Jan. 7, 1985). There is more than equal reason here to allow Congress, in its "continuing search," *CBS, supra,* 412 U.S. at 132, for a means to balance all the competing interests of veterans, to proceed without its

Swords to Plowshares Veterans Rights Organization has been so recognized, but its status may be adversely affected by its recent criminal conviction under 38 U.S.C. § 3502(b) for accepting payment from the VA with the intent to defraud the Government. *United States* v. *Swords to Plowshares*, No. CR-84-776 (N.D. Cal. Nov. 6, 1984).

options being unduly restricted by a constitutional holding. *See United States* v. *Kras*, 409 U.S. 434, 451 (1973) (Burger, C.J., concurring) (observing, in the context of a Congressional commission's continuing review of the bankruptcy laws: "The Constitution is not the exclusive source of law reform, even needed reform, in our system.").

The rule of according "great weight to the decisions of Congress" has been applied when a statute "raises equal protection concerns," *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980), and when legislation implicates fundamental rights under the First Amendment, as appellees assert here. *See, e.g., CBS, supra*, 412 U.S. at 102. One analytical consequence of applying the rule in these kinds of cases may have been a reduction in the magnitude of the governmental interest required to justify the effect of the challenged enactment on the constitutional rights involved.

The rule of restraint should have a like effect in resolving a due process challenge, but the strength of the governmental interest required to uphold a statute against a due process attack has not been differentiated by the Court as it has in First Amendment and equal protection cases, where a compelling or substantial increment can be demanded — and offset by the exercise of restraint. Accordingly, one way DAV might characterize the analytical consequence of applying the rule to appellees' due process claim is that Congress' comparatively more comprehensive institutional powers to inquire into the fairness of the procedural aspects of the VA benefit system and to weigh the competing interests among those affected by it, at least when those powers have been fully exercised and are being invoked again, call for a suspension of the ordinary rule that the judiciary is the expert among the Branches on matters of procedure. *See, e.g., Santosky, supra* note 7, 455 U.S. at 755-756 (standard of proof "is the kind of question which has been traditionally left to the judiciary to resolve.") (quoting *Woodby* v. *INS*, 385 U.S. 276, 284 (1966)). To put the proposition alternatively: "The role of the judiciary . . . does not extend to imposing procedures that merely displace congressional choices of policy." *Landon* v. *Plasencia*, 459 U.S. 21, 34-35 (1982).[9]

II. By Misconstruing the Nature of the Private Interest Involved, Undervaluing the Qualifications of Veterans Service Officers and Failing to Consider Important Non-Financial Government Interests, the District Court Struck a Skewed Due Process Balance.

DAV will conform its due process argument to the three-factor test set forth in *Mathews, supra*, 424 U.S. at 335, to dem-

[9] The contribution of VA disability benefits to the strength of the nation's active military forces is of particular relevance in this regard given Congress' power to "raise and support Armies . . . and maintain a Navy." U.S. Const. art. I, § 8. As far back as the 16th century, England enacted a statute for the relief of disabled veterans after battle with the Spanish Armada "to encourage others to serve," *Veterans' Administration Evaluation of Benefits, etc., 95th Cong., 2d Sess., Report by the Administrator of Veterans' Affairs* 1 (House Comm. Print 1978). In this country, the Continental Congress enacted the first national legislation to assist those with service-connected disabilities "to encourage enlistments." *Id.* at 4. Even before the Revolutionary War, veterans' benefits were provided by Plymouth Colony "to encourage the colony's soldiers against the Indians." *Veterans' Administration Analysis and Evaluation, etc., 95th Cong., 2d Sess., Report by the Administrator of Veterans' Affairs* 5 (House Comm. Print 1978). Continuing into the present, the Chairman of the Senate Veterans' Affairs Committee affirmed that efforts to "maintain our national security . . . include our commitment to those who must wage the war after they have served." *Hearings on Legislative Recommendations, etc., Before the Senate Comm. on Veterans' Affairs*, 96th Cong., 2d Sess. 63 (1980) ("1980 Senate Hearings") (statement of Sen. Cranston). As the Court recently emphasized in protecting military retirement benefits from diversion by state community property laws, "in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." *McCarty* v. *McCarty*, 453 U.S. 210, 236 (1981). The Court should similarly exercise restraint when considering veteran benefit legislation given its historical contribution to active military forces.

onstrate that the District Court erroneously applied that test in measuring the validity of the $10 fee limitation.[10] As DAV has just argued, the District Court failed to exhibit proper regard for the "strong presumption in favor of the validity of congressional action." *Schweicker* v. *McClure*, 456 U.S. 188, 200 (1982) (reversing District Court for holding that due process requires hearing officers on Medicare claims to be lawyers). This failure warrants particularly critical scrutiny of the District Court's application of the *Mathews* factors.[11]

[10] To the extent that this Court's summary affirmance in *Gendron* v. *Levi*, 423 U.S. 802 (1975), *aff'g Gendron* v. *Saxbe*, 389 F.Supp. 1303 (C.D. Cal.), was based upon the benefit-applicant status of the VA claimant-appellant there, the fact that certain individual appellees here are VA benefit recipients distinguishes *Gendron*. But to the extent that the affirmance was based on the *Gendron* District Court's determination that the $10 fee limitation satisfied due process, the decision calls for reversal of the District Court in this case.

[11] As a matter of either law or fact, this Court should make a final determination of appellees' claim despite the preliminary nature of the relief under review. As a matter of law — in this case, the District Court's failure, *inter alia*, to apply principles of judicial restraint — appeals courts ordinarily engage in plenary review of grants or denials of preliminary relief when the appeal is based upon an error of law. *See, e.g., Pratte* v. *N.L.R.B.*, 683 F.2d 1038, 1040 (7th Cir. 1982) ("when the availability of preliminary relief turns on interpretation of the law rather than the facts, the appellate court is free to review *de novo* the District Court's judgment."). As a matter of fact, the District Court purported to examine the due process adequacy of the fee limitation "as applied" to appellees. *NARS, supra*, 589 F.Supp. at 1309. But that characterization appears to have been no more than an attempt to distinguish the "great deal of evidence" marshalled in this case, *NARS* at 1310, from the "sparse," *id.*, record in *Gendron, supra* note 10, not an effort to confine the effect of the ruling herein to the appellees. As such, sound judicial administration should lead the Court to resolve this case finally rather than to require that the costs of further trial proceedings be borne for the comparatively small evidentiary gain that would be likely. *See, e.g., Triumph Hosiery Mills, Inc.* v. *Triumph International Corp.*, 308 F.2d 196, 200 (2d Cir. 1962) (court would not remand case following review of preliminary injunction in light of extensive record).

A. Preservation of the $10 Fee Limitation Would Foster the Psychological Value of Meaningful Communication of Veterans' Claims By and Through Similarly Situated Disabled Service Officers.

DAV does not disagree with the District Court's conclusion that "[m]any of the claimants and recipients are totally or primarily dependent upon [VA] benefits for their support." *NARS, supra*, 589 F.Supp. at 1314. Plainly the importance of such property interests as are at stake in many VA claims proceedings militates in favor of insuring that the $10 fee limitation does not deprive claimants of a fundamentally fair procedure.

But DAV believes that the District Court misconstrued the effect of "certain less direct interests" it found VA claimants also to possess. *Id.* at 1315. The trial court was sensitive to the "'psychological value to the veteran of personally communicating with bureaucracy'" before the veteran's claim is denied by the VA. *Id.* (quoting *Devine* v. *Cleland*, 616 F.2d 1080, 1088 (9th Cir. 1980)). Presumably, the District Court's view was that the $10 fee limitation operated as a barrier to full realization of that "psychological value," thus further undermining the statutes' constitutional validity.

In fact, however, the $10 fee limitation has itself indirectly served to foster that psychological value, rather than inhibit its realization, by contributing to the development of a dedicated corps of accredited representatives of recognized veterans' service organizations whose free assistance to VA claimants may be best illustrated by the NSOs who operate DAV's national service program. *See supra* pp. 2-3. As presented to the District Court:

> [A]ll DAV NSOs are wartime disabled veterans with service-connected, wartime disabilities. Like the clients they

represent, they have had to learn to face the handicaps that overshadowed their futures. Thus, they are able to relate to and understand the plight of the claimants they serve, not on the level of a cold business relationship, but on the personal level of individuals who have shared similar, painful and tragic experiences. Joeckel Decl., *supra* note 3, at ¶ 11.

It does not take a leap of faith to recognize that veterans' service organization representatives, and especially those possessing the characteristics of NSOs, supply to the veteran claimants whom they assist more than the substance of their skills, qualifications that DAV will address in the next section of argument. *See infra* pp. 17-21. These representatives also impart to claimants a sense that the personal conditions underlying their claims are fully appreciated and that these claims will be handled in the meaningful way that only one who shares a similar condition, produced by a similar experience, can assure. The fact that this assistance is rendered free of charge surely intensifies the claimants' perception of being well served.

The psychological consideration invoked by the District Court therefore works in favor of the $10 fee limitation, especially if invalidation of that provision would weaken the service officer system, as DAV will later argue would occur. *See infra* pp. 25-27. At the very least, it may be posited that those who would represent veterans for a profitable fee should appellees prevail would also, as a general rule, be less likely to convey the same measure of psychic satisfaction concerning meaningful communication. On balance, then, the "private interest that will be affected by the official action," *Mathews, supra*, 424 U.S. at 335, presents a factor of mixed influence in the due process analysis rather than one that unqualifiedly supports the judgment of the District Court.

B. The Extensive Training, Agency Familiarity, Organizational Expertise and Special Motivation of *Amicus Curiae's* National Service Officers, When Combined With the Nonadversarial Setting of VA Claims Administration, Minimize the Risk of Error Which Paid Attorney Involvement May Increase.

The principal reason for DAV's participation in this case, as stated earlier, *supra* p. 3, is that the Court's decision will necessarily raise an inference about the adequacy of DAV's most important nonprofit activity: the nationwide provision of free claims service through the NSO system. The inevitability of such an inference arises from the Court's necessary determination of whether the contribution of NSOs (and other service organization representatives) to the administration of VA claims, in conjunction with the nature of those proceedings, yields an "acceptable rate of error." *Califano* v. *Boles*, 443 U.S. 282, 283, 285 (1979) (recognizing the "special difficulties presented by the mass administration of the social security system," akin to the VA benefit system in which nearly five million claims were pending in one year, Jurisdictional Statement at 21 n.14). DAV submits that the current procedural structure of the VA benefit system more than satisfies that standard.

A useful starting point is the observation made by the Senate Veterans' Affairs Committee when it reported S. 349, a recent unsuccessful effort to alter the statutory scheme governing the adjudication of VA claims, *see supra* note 5:

> Many of the VA's internal procedures, particularly in the area of adjudication of claims, have developed over the years in such a way as *to afford to VA claimants some advantages not afforded to claimants before other agen-*

cies. Advantages most often cited are the VA's very liberal standards for the admission of evidence, and free representation before the VA by skilled officers of the various national veterans' service organizations — *advantages which are often credited for the informal, "nonadversarial" nature of VA proceedings. . . . [T]he Committee has given renewed attention and the utmost deference to these unique and desirable VA practices*. S. Rep. No. 97-466, 97th Cong., 2d Sess. 25 (1982) ("S. Rep. No. 97-466") (emphasis added).

Other participants in this case will describe these "desirable VA practices," including, by way of prominent example, the resolution of any reasonable doubt in favor of the claimant, 38 C.F.R. § 3.103(b), in more detail.[12] DAV would only conclude that the effect of veterans' service organization representatives like NSOs must thus be measured from a starting point at which the risk of erroneous deprivation of veterans' benefits is already substantially lower than it would be in the traditional adversary setting.

[12] The Government has described the VA benefit system principally by reference to VA regulatory provisions. Jurisdictional Statement at 3-8. Appellees assert that this description "departs dramatically from the record." Mot. to Aff., *supra* note 7, at 3. To the extent that the VA regulatory system as described by the Government satisfies constitutional requirements, as DAV submits it does, appellees' remedy is to attack not the constitutionality of statutes implemented by the regulations, but the VA's failure to follow its own regulations. To the extent that the VA's regulations implementing the statutory scheme are themselves viewed by the Court as falling short of constitutional requirements, a conclusion DAV would oppose, the Court should avoid unnecessary constitutional adjudication and declare that the VA improperly implemented the statutory scheme since the Court has been "willing to assume a congressional solicitude for fair procedure." *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979) (reversing constitutional basis for requirement of a hearing by construing Social Security Act to require it).

The same Senate Committee quoted above later commented that "there is a strong and vital system of veterans service officers who provide *excellent representation* at no cost to claimants." S. Rep. No. 97-466, *supra*, at 50-51 (emphasis added). The Chairman of the House Veterans' Affairs Committee, discussing DAV specifically, had earlier and in another context noted that its NSOs are "*fully qualified* to assist veterans in all phases and in all matters pertaining to benefits for the disabled veteran." 119 Cong. Rec. 10622 (daily ed. April 2, 1973) (statement of Rep. Dorn) (emphasis added). These authoritative characterizations of service officer skills substantiate the view that in appropriate circumstances, as here, "due process may be satisfied by the provision of a qualified and independent adviser who is not a lawyer." *Vitek* v. *Jones*, 445 U.S. 480, 499 (1980) (Powell, J., concurring in part).

The applicability of that view to this case is fully justified by the qualifications of NSOs. These include (a) the completion of an extensive NSO training program supported by the VA, (b) the familiar relationship with the agency before which the NSOs appear, (c) the organizational expertise acquired from DAV in such subject areas as those giving rise to the complex claims of special concern to the District Court, and (d) the special motivation to assist the claimants they represent. All of the more than 250 NSOs employed by DAV, whose training and operations are funded by approximately $18 million annually, *see supra* p. 2 & note 2, share these qualifications.

The NSOs' qualifications derive in part from their participation in a comprehensive 16 month training program which the VA usually sponsors under chapter 31 of Title 38, U.S. Code, because of each NSO's disabled status. Joeckel Decl., *supra* note 3, at ¶ 7. This targeted program is designed to educate NSOs in all aspects of the VA's benefit programs, the laws and regulations governing the allocation of benefits and the procedures used by the VA in processing claims. *Id*. at ¶¶ 7 and 8

and Appendix G attached thereto ("App."). Of the more than 2600 hours of on-the-job training, for example, half is devoted to compensation claims alone. *Id.*, App. at G-1 and G-2. In addition, the DAV National Service and Legislative Headquarters in Washington, D.C. frequently conducts intensive continuing education seminars at which NSOs are updated with new materials and information. *Id.* at ¶ 9.

Another advantage attributable to DAV representation is that NSOs are highly familiar with VA personnel and have ready access to VA institutional resources. *Id.* at ¶ 10. The close relationship that NSOs have with the VA has developed as a result of the nonadversarial nature of the claims procedures described earlier and the VA's provision to recognized service organizations like DAV of office space in the VA, 38 U.S.C. § 3402, and full access to the records and libraries of the agency. 38 U.S.C. § 3301(d). NSOs are therefore accustomed to dealing with VA personnel on a regular and informal basis in the nearly 70 VA offices where they work. *See supra* p. 3. The practical advantages that NSOs thus possess in seeking to successfully shepherd claims through the VA system should not be underestimated.

The District Court concluded that NSOs lack the expertise to handle cases in which there are "substantive" and "procedural" complexities. *NAKS, supra*, 589 F.Supp. at 1322-1323. On the contrary, by virtue of the NSO training program and the access which NSOs have to both VA and DAV resources, the NSOs have accumulated substantial expertise in both the procedural workings of the VA claims process and the difficulties associated with the proof of complicated claims. Complex though the operation of the VA claims system may be, NSOs have been educated in the intricacies of this process and have become highly specialized as a result of their concentrated practice.

As to the substantive complexities involved in modern VA claims such as those relating to exposure to atomic radiation,

Agent Orange and Post Traumatic Stress Disorder ("PTSD"), *id.* at 1320, these are well understood by DAV and its NSOs. For example, the first Congressional hearing on the effect of veterans' exposure to atomic radiation was held in 1979. *Veterans' Claims for Disabilities for Nuclear Weapons Testing: Hearing Before the Senate Comm. on Veterans' Affairs*, 96th Cong., 1st Sess. (1979). DAV testified extensively at that hearing on the health effects of exposure to atomic radiation and urged legislation to provide relief to the claimants. *Id.* at 220 and 234-237 (statement of Charles E. Joeckel, Jr.).[13]

DAV enjoys a particularly distinguished record with respect to its activities concerning PTSD. As reported in *The Forgotten Warriors: New Concern for the Vietnam Vet.*, BEHAV. MED. 38, 40 (July, 1979), DAV funded the "Forgotten Warrior Project" — "the first comprehensive study of the psychological and social profile of Vietnam veterans." Springing from this study, DAV developed a nationwide outreach project operated by its own NSOs — "one of the first positive steps toward helping the Vietnam veteran." APA Monitor, April, 1979 (published by the American Psychological Association). DAV subsequently published its own book on the subject: POST-TRAUMATIC STRESS DISORDERS OF THE VIETNAM VETERAN: OBSERVATIONS AND RECOMMENDATIONS FOR THE PSYCHOLOGICAL TREATMENT OF THE VETERAN AND HIS FAMILY (T. Williams ed. 1980).[14]

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[13] Among other things, Mr. Joeckel stated that the VA "should develop guidelines" to grant assistance in this area. *Id.* at 220. After years of persistent DAV effort, last fall the Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) ("Exposure Standards Act of 1984"). Section 5(a)(1)(B) of the Act now requires the VA to "establish guidelines" to resolve claims concerning veterans' exposure to atomic radiation. 98 Stat. 2727.

[14] DAV's ground-breaking effort was the forerunner for the establishment of the VA's own "Vet Centers." *See generally, Readjustment Counseling: Hearing Before the Subcomm. on Hospitals and Health Care of the House Comm. on Veterans' Affairs*, 97th Cong., 1st Sess. 205 (1981) (statement of Robert H. Lenham, Special Projects Officer, DAV). This ultimately led to the recognition of PTSD as a psychological disorder by the American Psychiatric Association.

Finally, as it did with respect to radiation exposure, *see supra* note 13, DAV urged that "guidelines for the disposition of phenoxy herbicide related claims" be developed. *Veterans' Exposure to Agent Orange: Hearings Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 539 (1983) (statement of Stephen L. Edmiston, Associate Deputy National Legislative Director, DAV). Section 5(a)(1)(A) of the Exposure Standards Act of 1984, *supra* note 13, now requires the VA to "establish guidelines" for this purpose. 98 Stat. 2727.[15]

The disabled status of NSOs was previously described as helping to foster the psychological value of a veteran's sense that his/her claim was personally communicated. *See supra* pp. 13-14. On the other side of that psychological equation is the special motivation of a wartime disabled veteran to help someone similarly situated. The unique bonding that such a shared experience makes possible needs no elucidation for its force to be conveyed. When it is combined with the extensive train-

See American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980). Mental disorders providing a basis for VA benefits must be diagnosed in accordance with this manual. 38 C.F.R. §§ 4.125 and 4.126.

[15] The District Court seems to have believed that attorneys could better "assist" claimants with respect to such complex claims. *NARS, supra*, 589, F.Supp. at 1322. DAV questions whether, assuming *arguendo* that NSOs' expertise in these areas does not offset the advantage of legal training, attorneys could fair any better in outcome. For example, in preliminarily approving the $180 million settlement of the Agent Orange litigation consolidated in the Eastern District of New York, the U.S. District Court noted that despite "five years of . . . extensive discovery," the most serious doubt about plaintiffs' case remained whether "present scientific knowledge would support a finding of causality." *In Re "Agent Orange" Product Liability Litigation*, MDL No. 381, slip op. at 7 and 96 (E.D.N.Y. Sept. 25, 1984). The court suggested the possibility of a directed verdict for defendants, but even if a jury were permitted to find a causal link between Agent Orange exposure and plaintiffs' diseases, the court was dubious whether the verdict would survive a motion for judgment n.o.v. *Id.* at 118 and 130. On January 7, 1985, the Court issued its final judgment approving the settlement and awarding approximately $10 million in legal fees. *In Re "Agent Orange" Product Liability Litigation*, MDL No. 381, slip op. (E.D.N.Y. Jan. 7, 1985). If the quantum of attorney effort in that case yielded so little in the way of proving the Vietnam veterans' claims, it seems legitimate to ask how much better than NSOs attorneys would fair with this and similar "complex" claims before the VA.

ing, agency familiarity and organizational expertise upon which NSOs can draw in the nonadversarial setting of the VA claims process, the risk that a claimant will be erroneously deprived of benefits is more than acceptably minimized for constitutional purposes.

Whatever risk does remain, DAV maintains that representation of veterans by private counsel would not significantly improve claimants' prospects. In a variety of contexts, this Court has found that representation by an attorney does not substantially reduce the risk of erroneous deprivation of a liberty or property interest. *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 33 (1981); *Vitek, supra*, 445 U.S. at 499-500 (Powell, J., concurring in part); *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974). *Cf. Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972). Moreover, the Court has been particularly reluctant to require counsel under the mandate of due process in situations such as obtain under the VA claims system, "where the prescribed procedure involved informal decision-making without the trappings of an adversarial trial-type proceeding," *Lassiter, supra*, 452 U.S. at 37 (Blackmun, J., dissenting). *See Goss* v. *Lopez*, 419 U.S. 565, 583 (1975); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 785-789 (1973). *Cf. Parham* v. *J.R.*, 442 U.S. 584, 604-609 (1979); *Wolff, supra*, 418 U.S. at 569-570. The need for counsel to insure a just result is primarily based upon the operation of an adversarial system in which an "equal contest of opposed interests" is the model. *Lassiter, supra*, 452 U.S. at 28. Outside such a system, attorneys have significantly less value, *see Gagnon, supra*, 411 U.S. at 789, and assistance in conformity with due process may be supplied in the form of a "qualified and independent adviser who is not a lawyer." *Vitek, supra*, 445 U.S. at 499 (Powell, J., concurring in part). *Cf. Wolff, supra*, 418 U.S. at 570.

That attorneys are less likely to reduce the risk of an erroneous decision in a nonadversarial setting, particularly given the

availability of NSOs, is indicated by available statistics from the VA's Board of Veterans Appeals ("BVA"). During fiscal years 1979 through 1982, the average allowance rate in BVA cases in which an NSO represented a veteran claimant was 13.3%, while the average allowance rate in cases in which a private attorney represented a claimant was 13.2%. Joeckel Decl., *supra* note 3, at ¶ 13. These statistics suggest that representation by private attorneys is no more effective than that of NSOs. Although paid attorneys might arguably fare better, the statistics also fail to reflect the fact that private attorneys, paid or not, are able to select their cases. By contrast, NSOs are obligated to represent all veterans who request representation, 38 C.F.R. § 14.628(d)(4), including those whose claims would have insufficient merit to induce an attorney to become involved.

The District Court found these statistics to be "not helpful." *NARS, supra,* 589 F.Supp. at 1317. It relied instead upon statistics which compared the effectiveness of NSOs to private attorneys in discharge-upgrade proceedings. These statistics are particularly unreliable since discharge-upgrade proceedings are formally adjudicated within the Department of Defense and are ultimately subject to judicial review, making them fundamentally different from VA claims proceedings.[16] DAV does not mean to suggest that NSOs and lawyers stand on an equal footing in adversarial proceedings outside the VA.

Ironically, it is conceivable that an influx of attorneys into the VA claims process could work to the overall detriment of claimants. Apart from the probability that attorneys would seek to limit their caseload primarily to meritorious claims as to which NSOs would just as likely prevail, the predictable result of substantial attorney participation in VA claims proceedings would be to make those proceedings more formal and

[16] Adverse upgrade decisions are administratively reviewable by the armed forces' Boards for Correction of Military Records, from which the normal appeal would lie in the U.S. Claims Court. *See generally*, 10 U.S.C. §§ 1551 *et seq*.

adversarial. *See Goss, supra,* 419 U.S. at 583 (1975); *Wolff, supra,* 418 U.S. at 569-570 (1974); *Gagnon, supra,* 411 U.S. at 787-788 (1973). As Justice Powell noted in *Vitek, supra*: "'The introduction of counsel into a revocation proceeding [would] alter significantly the nature of the proceeding' . . . because the hearing would inevitably become more adversary." 445 U.S. at 498 (Powell, J., concurring in part) (quoting *Gagnon, supra,* 441 U.S. at 787). Non-lawyers would be less prepared to represent claimants in a more adversarial and formal context, and because of the larger numbers of veterans they would likely represent, any comparatively lower margin of allowed claims that non-lawyers would thus experience could well exceed whatever increased margin attorneys might produce.

In sum, not only does the "excellent representation," S. Rep. 97-466, *supra* at 50-51, provided by veterans service officers like NSOs substantially minimize the risk of error in the nonadversarial setting of the VA claims process, but the added participation of paid attorneys in that process could operate to increase that risk for veteran claimants as a whole. The Constitution should not be read to reject the former in favor of the latter.

C. The Non-Financial Government Interests of Preventing the Diversion of Veterans' Benefits, Maintaining Nonadversarial Proceedings Involving Veterans, and Preserving Veterans' Organizations' Full Capacity to Represent Claimants and Assist the Congress, Warrant Upholding the $10 Fee Limitation.

The District Court commented that "the government has asserted little or no cognizable interest in maintaining the $10.00 fee restriction." *NARS, supra,* 589 F.Supp. at 1323. Thus the trial court dispensed with the final *Mathews* factor in one paragraph of a twenty-seven page opinion. While appellants are best able to articulate the substantial financial costs

to the Government if the current VA benefit system were altered as appellees desire, DAV would offer its views on non-financial costs since the former "are not of controlling weight in determining whether due process requires a particular procedural safeguard." *Mathews, supra,* 424 U.S. at 348.

An uncontested purpose of the fee limitation is to prevent diversion of VA benefits from veterans to attorneys and others. The District Court described the purpose as "paternalistic." *NARS, supra,* 589 F. Supp. at 1323. But even the Senate Committee that sought in 1982 to revise the fee limit stated that "continuing to discourage attorney representation . . . would, the Committee believes, *appropriately* serve to protect claimants benefits. . . ." S. Rep. 97-466, *supra* at 50 (emphasis added). In viewing the country's "long standing policy" of favoring veterans, this Court affirmed that it has "always been deemed to be legitimate." *Regan, supra,* 461 U.S. at 551 (quoting *Feeney, supra,* 442 U.S. at 279 n.25).[17]

Furthermore, as suggested by the Senate Committee's "utmost deference" to the "'nonadversarial' nature of VA proceedings," *see supra* p. 16, the creation of a more adversarial context for claimants by the introduction of attorneys would be particularly unseemly in light of the "moral obligation and debt of gratitude" owed to veterans. *Mitchell, supra,* 333 U.S. at 420. This Court has frequently recognized the government's

[17] The continuing legitimacy of guarding against unnecessary legal expenses was evidenced on January 7, 1985, when the court rejected an attorney's fee claim in the Agent Orange litigation," *supra* note 15, "requesting $2,500.00 . . . for doing nothing more than submitting a claim form — a task accomplished by tens of thousands of claimants without a lawyer's intervention." *In Re "Agent Orange" Product Liability Litigation*, MDL No. 381, slip op. at 55 (E.D.N.Y. Jan. 7, 1985). More broadly, the well-recognized litigious nature of modern society could lead veterans mistakenly to believe that attorneys are necessary to secure VA benefits in the event that their fees are constitutionally made payable. *See generally*, Barton, *Behind The Legal Explosion*, 27 STAN. L. REV. 567 (1975).

non-financial interest in preserving the nonadversarial nature of proceedings in a variety of settings. *See Parham, supra,* 442 U.S. at 605; *Goss, supra,* 419 U.S. at 583; *Wolff, supra,* 418 U.S. at 570.

An additional non-financial consideration in maintaining the current method of allocating veterans' benefits involves the Government's interest in maintaining the integrity and viability of veterans' organizations. In addition to the service programs which they operate, these groups provide vital assistance to the Congress in fulfilling its legislative, informing and oversight functions:[18]

> Those of us who have served on this Committee a number of years are well aware of *the excellent work of your organization of disabled veterans in support of fair and just compensation for service-connected disabilities*. . . . As in prior years, we will carefully review, consider and act upon the observations and recommendations of the Disabled American Veterans. 1980 Senate Hearings, *supra* note 9, at 44-45 (statement of Sen. Stafford) (emphasis added).

The nature of DAV's legislative activities with respect to VA compensation for disabilities underlying certain complex claims of concern to the District Court was suggested earlier. *See supra* notes 13-15 and accompanying text.

[18] As the Chairman of the Senate Veterans' Affairs Committee stated concerning recommendations made by such groups on VA authorizations and appropriations for fiscal year 1982:

> These annual presentations give us on the Committee an excellent opportunity for members to become more familiar with the views of the membership of veterans' organizations on the legislative needs relating to veterans. These sessions assist the committee in planning its priorities for the year. *FY82 Legislative Recommendations of Veterans' Organizations: Hearings Before the Senate Comm. on Veterans' Affairs,* 97th Cong., 2d Sess. 60 (1982) (statement of Sen. Simpson).

Two important aspects of veterans' groups like DAV that could be injured by a decision against the Government in this case are their service programs specifically and their reputations generally. It takes little vision to imagine that legal entrepreneurs would find NSOs to be as skilled as described above and would seek to lure them away from DAV to use them in a paralegal-type capacity in order to maximize profits. In addition, reputational damage from such a decision would be unavoidable, as mentioned above. *See supra* pp. 3 and 15.

One principal consequence of these injuries would directly conflict with the Senate Committee's expressed wish "not to disrupt unnecessarily the very effective network of non-attorney resources" that currently exists. S. Rep. No. 97-466, *supra*, at 49-50. Loss of NSO personnel — without replacements likely because even the youngest wartime disabled veterans are now established in careers — would be accompanied by lowered morale and a more adversarial VA that together would significantly weaken the NSO system. This consequence would in turn undermine the credibility of DAV's presentations to the Congress which, when combined with predictably adverse reactions from actual and potential DAV members and donors, would reduce the considerable value of the assistance that DAV currently renders the Legislative Branch.

So weakened, DAV would be correspondingly less able to provide the fraternal benefit to the veteran community intended by Congress when it included in DAV's charter the purpose of "stimulat[ing] a feeling of mutual devotion, helpfulness, and comradeship among all wounded, injured and disabled veterans." 36 U.S.C. § 90c. As Congress itself has thus indicated, to harm veterans' service organizations is to harm the nation's individual veterans as well. For those many veterans who would continue to desire the free assistance of the service organizations even if the fee limit were lifted, their choice would be restricted

by the opportunity made available to others to retain paid counsel. This significant interest of the veterans whom Congress has determined to benefit should not be subjected to such a delicate policy trade-off under the limitations of constitutional decision-making.

By ignoring the foregoing non-financial government interests, the District Court assigned too little weight to this *Mathews* factor, just as it assigned too much weight to the private interests and risk of error involved in the current VA claims system. Proper adjustment of the resulting imbalance will yield the conclusion that the $10 fee limitation does not violate appellees' rights to due process of law.[19]

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[19] As to appellees' First Amendment claim, DAV's due process analysis "demonstrates that [appellees' petition] rights under the First Amendment have been fully satisfied." *Ortwein* v. *Schwab*, 410 U.S. 656, 660 n.5 (1973). The District Court's conclusion that appellees sought attorneys to "obtain . . . compensation rather than . . . make a political statement," *NARS*, *supra*, 589 F.Supp. at 1326, subjects the individual appellees' interests in contracting with attorneys to economic regulation outside First Amendment associational protection. *In Re Primus*, 436 U.S. 412, 438 n.32 (1978). Finally, the fact that the $10 fee limitation "indirectly cripples" the organizational appellees' fundraising, *NARS*, *supra* at 1324, does not indicate an infringement of their First Amendment associational rights, but merely that their viability should not depend so vitally on receiving money from veteran claimants.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.[20]

Respectfully submitted,

JOSEPH C. ZENGERLE*
WILLIAM N. BERKOWITZ

BINGHAM, DANA & GOULD
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 822-9320

Counsel for
The Disabled American Veterans

*Counsel of Record

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[20] This brief was prepared with the able assistance of Ms. Kate D. Balaban, a third year student at the University of Chicago Law School.